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IN THE

Supreme Court of the United States

October Term, 1967

No. 805.

ARTHUR LEE RANEY, *et al.*,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT, a Public Body Corporate, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case August 9, 1967, rehearing of which was denied September 18, 1967.

Citations to Opinions Below

The unreported opinion of the district court is reprinted in the appendix, *infra*, at pp. 1a-14a. The opinion of the court of appeals is reported at 381 F.2d 252 (8th Cir. 1967) and is reprinted in the appendix, *infra*, at pp. 15a-25a.

Jurisdiction

The judgment of the Court of Appeals was entered August 9, 1967 and petition for rehearing was denied September 18, 1967, *infra*, pp. 26a-27a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether—13 years after *Brown* v. *Board of Education*,—a "freedom of choice" plan which maintains an all-Negro school is constitutional in a system with only two nearby school plants, one traditionally Negro and the other traditionally white, although assigning elementary grades to one school and secondary grades to the other would immediately desegregate the system.

2. Whether the court of appeals erred in denying all relief, dismissing the complaint, and declining to order the district court to supervise the desegregation process on the ground that the Department of Health, Education and Welfare had initially approved the Board's plan as facially sufficient to comply with Title VI of the Civil Rights Act of 1964.

Constitutional Provision Involved

This case involves Section I of the Fourteenth Amendment to the Constitution of the United States.

Statement

Negro students filed a class action September 7, 1965, to enjoin the Gould School Board from (1) requiring them and all others similarly situated to attend the all-Negro Field School; (2) providing public school facilities for

Negro pupils inferior to those for whites; and (3) otherwise operating a racially segregated system (R. 3-8). Plaintiffs first learned of a proposed school construction program during a November, 1965 hearing in the district court, and amended to pray that future replacement high school facilities be located on the premises of the white Gould High School, rather than at the Negro Field School (R. 12, 19, 138).

Gould is a small district of about 3,000 population, and total school enrollment of 879 in the 1965-66 school year (R. 79-80). Until September, 1965, the district had not taken any steps to comply with *Brown* v. *Board of Education*, and operated completely separate schools for Negro and for white pupils with racially separate faculties (R. 31). Negro students were instructed in a complex of buildings known as the Field School, and white students were taught in a complex of buildings known as the Gould School (R. 31). The two complexes are within 8 to 10 blocks of each other; each contains an elementary school and a secondary school (R. 31, 73).

The school district did not consider undertaking any desegregation program until the United States Department of Health, Education, and Welfare issued Guidelines implementing Title VI of the Civil Rights Act of 1964 (R. 121-23). September, 1965, the district adopted a "freedom of choice" plan of desegregation for all 12 grades, but later obtained approval from H.E.W. to withdraw three grades from the plan's operation for 1965-66 because of overcrowding in those grades caused by Negro requests to go to the white school. There were no white requests to go to the Negro school. As a result Negroes, in the 5th, 10th and 11th grades were turned away from the white school (R. 53-60, 62-63). During the 1965-66 school year, the enrollment figures for the school district were as follows (R. 79-80):

	Grades	Negro	White
Field Complex	1-12	509	0
Gould Complex	1-12	70	299

During the 1966-67 school year, the second year of "freedom of choice", the enrollment figures were as follows:[1]

	Grades	Negro	White
Field Complex	1-12	477	0
Gould Complex	1-12	71	304

New Construction to Perpetuate Segregation

White Gould High School, constructed in 1964, is the most modern facility in the district (R. 89). Adjacent white Gould Elementary School was constructed originally as a high school and was subsequently converted to an elementary school (R. 81-82). The Negro Field Elementary School is also modern, constructed in 1954; gymnasium and auditorium were added in 1960 (R. 89-91). Until the 1967-68 school year Negro high school classrooms were in a building constructed in 1924 concededly obsolete and inferior to the white high school (R. 10, 16, 130).

Promises by the Board to improve the Negro high school date back to 1954, a decade before any consideration was given to desegregation, and apparently resulted from a suit to require equal facilities for Negroes (131-132, 129).

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[1] The record in this case, like the records in all school desegregation cases, is necessarily incomplete by the time it reaches this Court. In this case the 1965-66 school year was the last year for which the record supplies desegregation statistics. Information regarding student and faculty desegregation during the 1966-67 school year was obtained from official documents, available for public inspection, maintained by the United States Department of Health, Education and Welfare. Certified copies thereof and an accompanying affidavit have been deposited with this Court and served upon opposing counsel.

Actual construction of a new high school building on the site of the Field school, however, did not begin until January, 1967. The new building was scheduled to open in Fall, 1967 (R. 65, 66).

The superintendent admitted that the old Field High School was clearly a "Negro" school, and probably would continue to be an all-Negro school if replaced with a new facility at the Field site (R. 67). He also conceded that it was inefficient for a small school district to construct a new secondary school when it already had one. There would be duplication of libraries, auditoriums, agriculture buildings, science laboratories, cafeterias, and other facilities (R. 74-76). He was asked (R. 76):

> Q. "This means that you have to spend a lot more money for equipment and for materials for the Negro school in order to just have an equal department with the white school?"
>
> He answered: "I suppose so. It would take more money to build a new building and equip it."

Plaintiffs sought to shift the construction site of the new high school to the site of the white school by a timely amendment during the hearing in November, 1965 more than a year before construction was scheduled to begin (R. 137-138). The district court refused to grant relief in an opinion in April, 1966. Because of illness the court reporter did not complete the transcript until one year later—April 1, 1967—thereby delaying determination of the appeal (R. 140). At the time the case was submitted to the court of appeals the outer shell of the new building at the Negro school site was completed.[2] Because the con-

[2] Petitioners filed in the court of appeals an affidavit of their attorney stating that the outer shell was completed but that a number of walls, plumbing facilities and fixtures and interior walls, the roof and flooring had not been completed, see *infra*, p. 18a.

struction of the replacement facility at the Negro school had progressed by the time briefs were filed in the court of appeals, petitioners asked that court to require a utilization of the Gould School site as the single secondary school, and the Field School site the single elementary school for the district. It was urged that such a utilization was practical, economical, educationally superior and would disestablish segregation.

Unequal Facilities and Programs

The record shows that for many years prior to constructing the new Negro high school the Board tolerated substantial inequalities between the segregated schools. The old all-Negro high school, a wooden frame structure, was admitted by the president of the Board to have been "grossly inferior" to the white high school (R. 10, 16, 130). He said that the reason no money was spent on the building was that every dollar available had been exhausted on other uses (R. 130). Nevertheless, a new all-white high school was constructed at the Gould site (rather than at the Negro Field site) in 1964 following a fire which destroyed the old high school building there (R. 83).

The Negro Field High School is completely unaccredited; the Arkansas State Department of Education rates the Field Elementary School class "C" (R. 31) and the white Gould Schools "A" (R. 10). The Negro school bathrooms were in a building separated by a walk exposed to weather (R. 51-52); the white schools had rest rooms in each building (R. 50, 52).

There is an agriculture building at the predominantly white high school, and a hot lunch program for elementary

and secondary students but none at the Negro site (R. 40-41). The library at the white high school contains approximately 1,000 books, and a librarian (R. 42-43). The Negro school has only three sets of encyclopedias, one purchased a month before the hearing in this case (R. 113-114). These books were kept in the principal's office, rather than in a separate library, and the principal, in effect, functions as librarian, to the extent that such function is required (R. 114). The superintendent had a complete lack of knowledge of the extent of library facilities at the Negro school (R. 42).

The science facilities at the Negro high school were inferior to those of the predominantly white high school, even though the former is larger (R. 43-44). Pupils who attend Gould generally have an individual desk and chair; the standard pattern at the old Negro school was a folding table with folding chairs and three students on each side, sitting at the table (R. 47-48).

The "per pupil" expenditure is less at Field School than for the formerly all-white, now predominantly white, Gould School (R. 44). The system has charged "enrollment fees" to pupils at Field, but not at Gould (R. 44-45). It was also the practice to require Negro students to pick cotton in the fields during class time to earn money for school fund raising projects, and to pay "enrollment fees" (R. 44-46).

Unequal per pupil expenditures are also reflected in higher student-teacher ratio at the Negro school i.e., the average class size is larger (R. 59-62). There are 14 teachers at Gould, but only 16 teachers at Field although it has about 130 more students (R. 60-61). The range of Negro teacher salaries is from $3,870 to $4,500; for white teachers, the range is from $4,050 to $5,580 (R. 33-39).

There are also disparities in course offerings. Neither vocational agriculture nor journalism, offered at Gould, are offered at Field (R. 52-53). There is a similar disparity in extracurricular activities. The larger Negro school has no football, basketball, or track programs, whereas there are football, basketball, and track teams at the white school (R. 106-107). There is a Future Farmers of America vocational club at the white school, but none at the Negro school "because they do not have an agricultural department" (R. 106).

Teacher Segregation

The school system has no plans for substantial faculty desegregation. In 1965, the Board planned to assign two white teachers to the Negro school but no Negro teachers to full teaching duties at the white school (R. 67-70). However, by the 1966-67 school year the only faculty desegregation which had taken place was assignment of one part time white teacher to the Negro school.[3] Faculty meetings had not been integrated (R. 68). At trial, the superintendent stated that "we have kept that in the background, we want to get the pupil integration question settled and running as smoothly as possible before we go into something else" (R. 68).

When asked whether re-assignments of faculty members were eventually contemplated, the superintendent stated that "we do not have any plans to re-assign anybody" (R. 69). He stated that, in compliance with H.E.W. requirements, the school system "will attempt to employ Negro teachers in a predominantly white school on a limited basis, and particularly in positions that do not involve direct instructions to pupils" (R. 69). The superintendent

[3] See Note 1, *supra*.

described the Negro teachers' academic qualifications as superior to the white teachers. Every Negro teacher had a bachelor's degree and two had master's degrees. Only one white teacher had a master's degree; two have no degree (R. 33, 94-95).

Intimidation

When the PTA at the Negro school began to protest to the superintendent and the Board the deplorable conditions at the old Negro high school the superintendent responded by issuing an order which forbade the Negro PTA from meeting in the Negro high school (R. 63-64). He stated: "The reason for that is, as I understand, the PTA had evolved into largely a protest group against the school board and the policies of the board. The members of that organization were the same who planned to demonstrate against the Gould High School and had sent chartered bus loads of people to Little Rock to demonstrate around the Federal Building, who were getting a chartered bus of sympathizers to come to this hearing today and it does not seem right to us to furnish a meeting place for a group of people that is fighting everything we are trying to do for them" (R. 64).

When questioned whether this meant the Negro high school parents could not have a PTA, the superintendent responded: "They can have a PTA but they can meet somewhere else" (R. 64). He later admitted that he had no knowledge that any plans for marches or demonstrations had been made at a PTA meeting, and that all that he heard to this effect was hearsay (R. 108-109). The superintendent and some members of the Board obtained an injunction against several civil rights groups, enjoining them from protesting conditions in the system (R. 63).

Denial of Relief by the Courts Below

The district court denied all relief and dismissed the case in an opinion April 26, 1966 (R. 12-25). The court relied on the fact that the school district adopted a plan without court order, that the plan was approved by the Department of Health, Education, and Welfare, and that some Negro students were in fact attending the "white" school. With respect to constructing new secondary school replacement facilities on the site of the present Negro school, rather than enlarging the previously all-white school, the court decided that the replacement plan was not "solely motivated by a desire to perpetuate or maintain or support segregation in the school system" (R. 24-25).

The court of appeals found that the Board was operating under a freedom of choice plan which on its face met standards approved by the circuit and the Department of Health, Education, and Welfare; that there was "no substantial evidence to support a finding that the Board was not proceeding to carry out the plan in good faith"; that progress was being made in equalizing teachers' salaries; and that relief requiring that the replacement construction be undertaken at the Gould site could not be effective because considerable progress has been made in constructing the building on the Field site.[4]

Although the court found that "There is no showing that the new construction added could not be converted at a reasonable cost into a completely integrated grade school or into a completely integrated high school *when the appro-*

[4] Plaintiffs filed notice of appeal and oral argument was originally scheduled at the same time as a case involving similar issues, *Kelley* v. *Altheimer*, 378 F.2d 483 (8th Cir. 1967). However, the court reporter was sick for an extended period of time, and was unable to complete the transcript until April 1st, 1967 (R. 140).

priate time for such course arrives" (emphasis supplied), it declined to order conversion of one school plant to use as an elementary school and the other as a secondary school as such relief had not been considered by the trial court. In addition, the court held that petitioners were not entitled to a comprehensive judicial decree governing the operation of the "choice" plan as ordered by a different panel of the court in *Kelley* v. *Altheimer,* 378 F.2d 483 (8th Cir. 1967), and affirmed dismissal of the complaint.

A petition for rehearing *en banc* or by the panel, adverting to a conflict between panels of the court with respect to standards for approval of desegregation plans, was denied September 18, 1967.

REASONS FOR GRANTING THE WRIT

Introduction

The question here is whether in the mid-sixties, a full school generation after *Brown* v. *Board of Education,* a board which stubbornly refused to comply until threatened with loss of federal funds, may, with judicial approval, adopt a desegregation plan which perpetuates racially identifiable schools, although a practical, economical, and educationally superior alternative would disestablish the dual system. Similar issues are pending here in *Charles C. Green* v. *County School Board of New Kent County, Virginia,* No. 695, October Term, 1967, and *Brenda K. Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee,* No. 740, October Term, 1967. A second question, no less significant, is whether a district court and court of appeals may dismiss a complaint broadly challenging the constitutionality of desegregation policies and refuse to supervise the desegregation process because the

Board has adopted a plan facially approved by the United States Department of Health, Education, and Welfare.

In the Gould School District, as elsewhere, "free choice" has not achieved meaningful desegregation. Although the proportion of Negroes in all-Negro schools has declined since 1954, more Negro children are now attending such schools than in 1954.[5] Indeed, during the 1966-67 school year, 12 years after *Brown*, more than 90% of the almost 3 million Negro pupils in the 11 Southern states still attended schools over 95% Negro; 83.1% were in 100% Negro schools.[6] In this case approximately 85% of the Negro pupils in the system still attend schools with only Negroes. Desegregation has been a one-way street—a few Negroes moving into white schools, no whites attending Negro schools. "This June, the vast majority of Negro children in the south who entered the first grade in 1955, the year after the *Brown* decision, were graduated from high school without ever attending a single class with a single white student,"[7] a result plainly attributable to the prevalence of "choice" plans. The United States Civil Rights Commission in its most recent report stated:

> The review of desegregation under freedom of choice plans contained in this report, and that presented in last year's commission's survey of southern school

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[5] *Southern School Desegregation, 1966-67*, a Report of the U.S. Commission on Civil Rights, July 1967, p. 11.

[6] *Id.* at 165.

[7] *Id.* at 147. As the Fifth Circuit has had occasion to say "[f]or all but a handful of Negro members of the High School Class of 1966, this right [to a racially nondiscriminatory public school system] has been of such stuff as dreams are made on." *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 845 (5th Cir., 1966) *aff'd with modifications on rehearing en banc*, 380 F.2d 385 (1967) cert. den. *sub nom., Caddo Parish School Board* v. *United States*, —— U.S. —— (October 9, 1967).

> desegregation, show that the freedom of choice plan is inadequate in the great majority of cases as an instrument of disestablishing a dual school system. Such plans have not resulted in desegregation of Negro schools and therefore perpetuate one-half of the dual school system virtually intact. (Emphasis added.)[8]

By dismissing the complaint, the courts below totally refused to supervise the desegregation process, remitting Negro school children to a supposed remedy under Title VI of the Civil Rights Act of 1964. Such a disposition is unprecedented. It is particularly difficult to comprehend here because the H.E.W. Guidelines do not regulate the impact of construction policy or include specific standards to measure the effect of construction on "freedom" in a "freedom of choice" plan. The irony of the court of appeals deferral to H.E.W. is that in formulating desegregation standards the Department is guided by legal principles emanating from the courts.[9] For the Guidelines to develop in accordance with constitutional desegregation standards, the courts must continue to develop those standards with respect to central, but not heretofore considered, issues such as the impact of school construction policies on a desegregation plan and remedies appropriate to overcome institutionalization of segregation.

This petition is filed at a critical time in American education. Under the newly enacted Elementary and Secondary Education Act of 1965, 20 U.S. §241A, federal aid to the states for education is constituting an increasingly significant portion of the school budget. "In many cases

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[8] *Southern School Desegregation, 1966-67,* a Report of the U.S. Commission on Civil Rights, July, 1967, pp. 152-153.

[9] The Fifth Circuit recognized this in *United States* v. *Jefferson County Board of Education, supra,* at 372 F.2d 847, 851.

higher than 20% and in some cases higher than 30%." [10] These vast funds can either institutionalize segregation or operate as a force to eliminate it. Too often they have been a force for segregation. As the U.S. Commission on Civil Rights has reported:

> That Title I funds have been employed in such a manner as to institutionalize and strengthen the dual school structure is apparent when the use of such funds in the construction of new school facilities is examined. In at least one district, for example, school authorities used Title I funds to purchase portable classrooms for overcrowded Negro schools. In another district, Title I funds were used to build a vocational training shop midway between a white and a Negro school to be used separately by the children at each school. In still another district, Title I funds supplied one-third of the money to add separate gymnasiums to white and Negro schools which were 1,000 yards apart.[11]

This particular case, *Green* v. *County School Board of New Kent County, Virginia,* No. 695, October Term, 1967 and *Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee,* No. 740, October Term, 1967, now pending before the court, do not involve the expenditure of ESEA funds, although in the instant suit the school board has been spending other federal grants. The causes arose before ESEA funds might have become an issue. But over years to come thousands of districts, probably including those mentioned above, will be receiving such monies with consequences that will tend to establish or disestablish

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[10] *Southern School Desegregation, 1966-67,* a Report of the U.S. Commission on Civil Rights, July, 1967, at p. 130.

[11] *Id.* at p. 136.

segregation as well as affect other aspects of the education process. The disposition of this case will be exceedingly important in such a development because this case involves standards which H.E.W. may impose on a district or from which it may relieve a district in the course of administering federal monies. This case, therefore, involves the relationship between this Court's interpretation of the Constitution and the administration of federal statutes implementing that interpretation, a matter of paramount importance.

The Court Below Erred in Dismissing the Complaint Without Further Inquiry Into the Feasibility of Grade Consolidation or Other Relief Which Would Disestablish Segregation.

A. By Dismissing the Complaint, the Courts Below Abdicated Their Responsibility Under *Brown* v. *Board of Education* to Supervise Disestablishment of the Segregated System.

Petitioners made a timely challenge to racially planned construction of new secondary school classrooms on the Negro school site. They did not challenge the replacement of a dilapidated Negro school generally but asked only that the construction, not scheduled to begin for over a year, take place on the white school site. Under a choice plan, to do otherwise would result in perpetuating an unmistakably identifiable Negro school. After the district court failed to enjoin the construction and a court reporter's illness delayed the appeal, the new building's outer shell was completed. In the court of appeals petitioners sought utilization of the dual plants as constructed in a maner which would disestablish the segregated system. The court ruled that it would not consider utilization of one plant for elementary students and the other

for secondary students because this relief was not sought in the trial court. It affirmed dismissal of the complaint.

We submit this is an ironic and unnecessary result which demonstrated a misconception by the court of its equitable powers and responsibility in a school desegregation case. Desegregation is by its nature a continuous process which requires continuing supervision by the lower courts. Records are always somewhat out of date and relief to be effective must be fashioned with flexibility. In the circumstances of this case, where completion of the construction merely altered the appropriate form of relief, dismissal of the complaint was abdication of jurisdiction over the desegregation process. See *Brown* v. *Board of Education*, 349 U.S. 294, 301 (1955); *Calhoun* v. *Latimer*, 377 U.S. 263 (1964); *Brooks* v. *School Board of Arlington County*, 324 F.2d 305 (4th Cir. 1963); *Smith* v. *Morrilton*, 365 F.2d 770, 783 (8th Cir. 1966); Cf. *Smith* v. *Hampton Training School*, 360 F.2d 577, 581 (4th Cir. 1966). As the court of appeals said in *United States* v. *Jefferson County Board of Education, supra* (380 F.2d at p. 389): "School desegregation cases involve more that a dispute between certain Negro children and certain schools. If Negroes are ever to enter the mainstream of American life as school children they must have equal educational opportunities with white children." The fact that petitioners' request for consideration of a grade consolidation plan had not been sought in the trial court does not justify dismissal of this case. The construction itself, and the failure of the Board to disestablish segregation, were the subject of timely attack in the district court. It was not feasible to raise the issue of consolidation because at the time the trial was held the new construction was not scheduled to begin for over a year. At the very least, the court of appeals was obligated to remand to the district court for a

hearing with instructions to order grade consolidation if not educationally impractical.

It is submitted that by dismissal of the complaint, at a time when segregation is entrenched, the panel failed to adhere to the rule of *Brown* v. *Board of Education*, 349 U.S. 294, 301 (1955) and numerous decisions of lower courts which hold that district courts must retain jurisdiction until a racially nondiscriminatory school system is a reality.[12] In *Brown*, federal courts were expressly directed to retain jurisdiction in order to supervise the enforcement of desegregation. Here, the court simply refused to be influenced by developments subsequent to trial even though their genesis, the construction program, was subject to timely attack.[13] The failure of the court of

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[12] See *e.g. Brooks* v. *School Board of Arlington County*, 324 F.2d 305 (4th Cir. 1963); *Buckner* v. *Board of Education*, 332 F.2d 452 (4th Cir. 1964); *Yarbrough* v. *Hulbert-West Memphis*, 380 F.2d 962 (8th Cir. 1967).

[13] In the second *Brown* decision this Court directed that "in fashioning and effectuating the decrees, the courts will be guided by equitable principles." (349 U.S. at 300). Equity courts have broad power to mold their remedies and adapt relief to the circumstances and needs of particular cases as graphically demonstrated by the construction given to 15 U.S.C. §4 in restraining violations of the Sherman Antitrust Act. The test of the propriety of such measures is whether remedial action reasonably tends to dissipate the effects of the condemned actions and to prevent their continuance, *United States* v. *National Lead Co.*, 332 U.S. 319 (1947). Where a corporation has acquired unlawful monopoly power which would continue to operate as long as the corporation retained its present form, effectuation of the Act has been held even to require the complete dissolution of the corporation. *United States* v. *Standard Oil Co.*, 221 U.S. 1 (1910); *Schine Chain Theatres* v. *United States*, 334 U.S. 110 (1948). Numerous decisions establish that the federal courts construe their power and duties in the supervision of the disestablishment of state imposed segregation to require as effective relief as in the antitrust area. So in *Griffin* v. *School Board of Prince Edward County, Va.*, 377 U.S. 218 (1964) this Court ordered a public school system which had been closed to avoid desegregation to be reopened. *Carr* v. *Montgomery County (Ala.) Board of Education*, 253 F. Supp. 306 (M.D. Ala. 1966), ordered twenty-one (21) small inadequate segregated schools to be closed over a two

appeals to remand to the district court with instructions to order consolidation, if feasible, demonstrates a too narrow view of the power and duties of a federal court of equity in supervising desegregation and granting relief required by the Constitution.[14] At one point in its opinion the court of appeals states that the parties had no opportunity to offer evidence on the feasibility of consolidation and the trial court had no opportunity to pass on the issue. If the defect was solely one of evidence, however, the proper remedy was remand to the district court for further proceedings, not dismissal.

Other portions of the panel's opinion suggest, however, that it affirmed dismissal of the complaint for quite different, although also erroneous, reasons:

> Moreover, there is no showing that the Field facilities with the new construction added could not be con-

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year period and the students reassigned to larger integrated schools. *Dowell* v. *School Board of Oklahoma City*, 244 F. Supp. 971 (W.D. Okla., 1965), aff'd 375 F.2d 158 (10th Cir., 1967), cert. den. 387 U.S. 931 (1967), ordered the attendance areas of pairs of six-year junior-senior high schools in adjacent neighborhoods consolidated, with one school in each pair to become the junior high school and the other to become the senior high school for the whole consolidated area. The Fifth Circuit has held that a district court has power to enjoin "approving budgets, making funds available, approving employment contracts and construction programs . . . designed to perpetuate, maintain or support a school system operated on a racially segregated basis." *Board of Public Instruction of Duval Co., Fla.* v. *Braxton*, 326 F.2d 616, 620 (5th Cir., 1964). The Fourth Circuit has held that a school construction program an appropriate matter for court consideration in spite of the possible complexities involved. *Wheeler* v. *Durham City Board of Education*, 346 F.2d 768 (4th Cir., 1965).

[14] The continuous nature of the desegregation process has consistently obligated appellate courts to fashion relief despite the occurrence of events subsequent to judgment in the district court. Such has been the common practice of the courts applying *Brown* and indeed it had been the practice of the Eighth Circuit until this case. *Calhoun* v. *Latimer*, 377 U.S. 263 (1964); *Smith* v. *Morrilton*, 365 F.2d 770 (8th Cir. 1966).

> verted at a reasonable cost into a completely integrated grade school or into a completely integrated high school *when the appropriate time for such course arrives.* (Emphasis supplied.) Appendix, infra, p. 20a.

Utilization of one school as elementary and one as secondary school is thus acceptable to the court of appeals but only "when the appropriate time for such course arrives." Such language strongly implies that it is a notion of deliberate speed which led the court to reject grade consolidation and approve a choice plan and not solely that petitioners did not seek in the trial court altered utilization of classrooms which were not even constructed at the time of trial. But the time for deliberate speed is over. Over two years ago this Court stated, "more than a decade has passed since we directed desegregation of public school facilities with all deliberate speed. . . . Delays in desegregating school systems are no longer tolerable." *Bradley* v. *School Board of the City of Richmond,* 382 U.S. 103, 105 (1965). In 1964, the Court said: "There has been entirely too much deliberation and not enough speed. . . ." *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 229. The Court should grant certiorari in this case to make it clear that "the appropriate time" is now.

By their opinions and dispositions the courts below indicated that they regard the United States Department of Health, Education, and Welfare as having controlling responsibility for supervising school desegregation in Gould despite the fact that H.E.W. Guidelines do not deal with the impact of construction policy on a "freedom of choice" plan, that H.E.W. had not required modification of the construction plan or in any way sought to ameliorate its impact. To be sure H.E.W. Guidelines are entitled to substantial weight as general propositions of school desegregation law, and as minimum standards for court-ordered

desegregation plans. The same cannot be said for H.E.W. administrative approval of a particular school district's actual compliance with constitutional standards. With its limited personnel and funds, the Department is simply unable to ascertain all of the relevant facts about the performance of an individual school district in the way that a court hearing can, especially where, as here, H.E.W. Guidelines do not even purport to regulate the effect of construction policy. H.E.W.'s "compliance reviews and enforcement proceedings" are "not planned in a rational and consistent manner"; the Department's appraisal of desegregation sometimes cannot be but "faulty and inefficient." "Manpower limitations" force the Department to fail to proceed against many districts which are not in compliance. See *Southern School Desegregation,* 1966-67, A Report of the U. S. Civil Rights Commission, July, 1967, pp. 58, 59. Compare *Cypress* v. *Non-sectarian Hospital Association,* 375 F.2d 648, 658, 659 (4th Cir. 1967) where a hospital defended a desegregation suit on grounds of H.E.W. approval, but the court ruled that H.E.W.'s compliance mechanism was so inefficient that it was not an equitable defense to a suit based on deprivation of constitutional rights. Unfortunately, the sorry statistics of southern school desegregation, see *supra* p. 12, reflect the inability of the Department to police, effectively, compliance with the Guidelines.

Petitioners complained, moreover, of a violation of their constitutional rights; not statutory rights such as they may have under Title VI of the Civil Rights Act which regulates the relationship between the federal government and its grantees. The courts may not abdicate their responsibility to construe the performance of school boards in terms of the constitutional standards of the Fourteenth Amendment. Petitioners have been unable to locate any

decision which holds to the contrary. In this regard, the court below fundamentally misconstrued the role of burden of proof in school desegregation cases. The burden of proof is not on plaintiffs to demonstrate that a school system which undisputedly has been segregated for generations is still segregated, but on the school board to demonstrate that its desegregation plan desegregates the system. *Brown* v. *Board of Education, supra.* That burden is not carried by adoption of a "freedom of choice" plan when another plan which apparently is reasonable and possible will immediately desegregate the system.

B. "Freedom of Choice" Is Incapable of Disestablishing Segregation in the Gould School District.

The fundamental premise of *Brown* v. *Board of Education* was that segregation in public education had very deep and long term effects upon Negroes who were segregated. It is not surprising that individuals, reared in that system and schooled in the ways of subservience (by segregation in schools and every other conceivable aspect of existence) who are given the opportunity to "make a choice," chose, by inaction, that their children remain in Negro schools.[15] By making the Negro's exercise of choice the critical factor, school authorities virtually insure desegregation's failure. Moreover, intimidation, a weapon

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[15] In its *Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964* (referred to as the Guidelines), the Department of Health, Education, and Welfare states (45 CFR Part 181.54):

> A free choice plan tends to place the burden of desegregation on Negro or other minority group students and their parents. Even when school authorities undertake good faith efforts to assure its fair operation, *the very nature of a free choice plan and the effect of long-standing community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group students.* (Emphasis added.)

well-known throughout the south, has been employed to deter transfers. Every community pressure militates against the affirmative choice of white schools by Negro parents. Here the heavy hand of segregation did its work in overt fashion.

First, "The only school desegregation plan that meets constitutional standards is one that works" (United States v. *Jefferson County Board of Education, supra,* 372 F.2d at p. 847 (emphasis in original)) and the Gould plan has not worked. In both first and second year of its operation only about 70 Negro pupils attended the white school and no whites "chose" to attend the Negro school. In the first year of the plan several Negroes "chose" the white school but were refused admission due to overcrowding, an overcrowding caused in part by the fact that no whites "chose" to attend the Negro school. Only one teacher has been assigned to a desegregated faculty, and that teacher on a part time basis. In June, 1967, the superintendent informed the Department of Health, Education and Welfare that he anticipated an increase of only 14 Negro students in the white school for the 1967-68 school year, the third year of desegregation and that again no whites would attend the Negro school. No Negro teacher would be assigned to teach at the white school; one white teacher and one white supervisor would have part time duties at the Negro school, see note 1, *supra.* In short, in over two years of operation "freedom of choice" has not and does not appear capable of disestablishing segregation.

Second, the record shows active intimidation of the Negro community. The PTA of the Negro school was prohibited by the superintendent from meeting at the school once it began to protest conditions there, and an injunction was obtained by the board of education against public protests concerning school conditions (R. 63-64).

Third, the degree of inequality between the Negro and white high schools which has been maintained for so long inevitably communicates to the Negro community that the Board could not be trusted to administer a "freedom of choice" plan fairly, see *supra* pp. 6-8. Until 1965, the Negro high school had such a poor physical plant and program that it was completely unaccredited by the State of Arkansas, while the white high school had an "A" rating (R. 10, 16, 31, 83, 130). Long promised reconstruction took place only after adoption of a "freedom of choice" desegregation plan when a new school would have the possible effect of limiting the number of Negro transferees under the choice plan. Not only has the practice of segregation followed by this district been unconstitutional since 1954, *Brown* v. *Board of Education,* 347 U.S. 483, but the "gross inferiority" of the separate public school facilities provided for Negro students has been unconstitutional at least since 1938, *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337; *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637 (1950). The court of appeals erred fundamentally, in ignoring the relevance of these historic inequalities to the validity of the choice plan.

Fourth, the character of the new replacement construction on the traditional segregated site (and that no rational educational purpose is apparent behind such dual construction) is not susceptible to any other interpretation by the community, Negro *and* white, than that the Board wishes to maintain a segregated system, with one school intended for whites and the other intended for Negroes, see *Kelley* v. *Altheimer,* 378 F.2d 483, 490, 496 (8th Cir. 1967). This was just as unambiguous an act as re-writing the word "white" over the door of the Gould School and the word "Negro" over the door of the Field School—and

is just as coercive to the Negroes who have traditionally been informed by the segregated system that they were not wanted in "white" institutions, and to whites who have been informed that it was not proper for them to be in "Negro" institutions. The replacement construction here has precisely the same effect on the "freedom" in a "freedom of choice" plan as does the maintenance of all-white and all-Negro faculties at various schools in a system. *Cf. Bradley* v. *School Board of the City of Richmond,* 382 U.S. 103 (1965); *Kier* v. *County School Board of Augusta Co., Va.,* 249 F. Supp. 239, 246 (W.D. Va., 1966).

Fifth. The integration of faculty is a factor absolutely fundamental to the success of a desegregation plan, for a school with a Negro or white faculty will always be a Negro or white school. Nevertheless, the Board has assigned no Negro teachers to regular teaching at the traditionally white school, and only two whites to limited, non-teaching, duties at the traditionally and still all-Negro school (R. 67-70; see note 1, *supra*). There are no plans for substantial desegregation in the future (R. 68-69).[16] Compare *Kelley* v. *Altheimer,* 378 F.2d 483, 491 (1967).

The duty of the School Board was to convert the dual school system it had created into a "unitary non-racial system." Although it had an alternative which would have disestablished the dual system more speedily and with less educational inefficiency, the Board chose a method whose success depended on the ability of Negroes to unshackle themselves from the psychological effects of the dual system of the past, and to withstand the fear and intimidation

[16] The failure of the Board to take meaningful steps to integrate its faculty is consistent with what the record shows: that the Board, by adopting freedom of choice, could not in good faith have believed or intended that the dual system would thereby be converted into the nonracial system required by the Constitution.

of the present and future. Only a "freedom of choice" plan subjects Negroes to the possibility of intimidation or gives undue weight to the very psychological effects of the dual system that this Court found unconstitutional in *Brown* v. *Board of Education*. Nor did the Board introduce evidence to justify adoption of a method, which if it could disestablish the dual system at all, would require a much longer period of time in the method petitioners urge. The failure of the Board to show, by clear and convincing evidence, the existence of such administrative reasons as this Court contemplated in *Brown II* might justify delay, made it error for the courts below to abdicate totally to an administratively supervised "freedom of choice" plan and refuse to place the Board under the restraint of a court order.

C. Use of One School for Elementary Grades and the Other for Secondary Grades Is a Reasonable Alternative to "Freedom of Choice" Which Will Disestablish the Dual System.

Because of the very simple configuration of this small district, there is a clear-cut choice between a system composed of one reasonably-sized integrated elementary school and one reasonably-sized integrated secondary school, or a system composed of two inefficiently-small, combination elementary and secondary schools. The superintendent's concession that the replaced Negro school would continue to be all-Negro (R. 67) as well as the obvious educational inefficiency and undesirability of the dual schools provides a reasonable basis for providing that one site shall be used for an elementary school and the other site for a secondary school. The system's school buildings as constructed are adaptable to changed usages and whatever additional cost might be involved in alteration, as the court of appeals recognized, appendix, *infra*, p. 20a, can be more than bal-

anced against the continued extra operating cost of the inefficient dual system.

The court of appeals failed to order grade consolidation because of the time when such relief was sought, a ruling which is discussed fully, *supra* pp. 15-19. For this reason, however, we believe that the proper course for this Court to follow is to remand to the district court for a determination of the feasibility of consolidation with instructons to order such relief if not impractical. We, therefore, restrict ourselves in this section of the petition to a brief showing that such utilization is shown by this record to be a sufficiently workable and attractive method of administering the system for the lower courts to be required to consider it on the merits. See *e.g. Calhoun* v. *Latimer*, 377 U.S. 263 (1964).

The school facilities of the district ideally lend themselves to a plan of consolidation. The traditionally white Gould High School is the most modern facility in the district, having been completed in 1964 (R. 89). The immediately adjacent Gould Elementary School was originally constructed for use as a high school, and was subsequently converted to an elementary school (R. 81-82). If the Gould Elementary School were converted back to use as a secondary school, the Gould site would be clearly suitable for all the secondary students in the district. The 1966-67 secondary enrollment of the district was 360 for grades 8-12, while the total enrollment at the Gould School was 375 (grades 1-12).[17]

The all-Negro Field Elementary School is also a modern facility, constructed in 1954 with subsequent additions (R. 89-91). The gymnasium is adequate for both the present

[17] See footnote 1, *supra*.

number of Negro elementary and Negro high school students, so that it would also be suitable for use by all of the elementary students in the system. The new building constructed by the system for use as the Negro high school is adjacent to the Field Elementary School, and can easily be furnished as an addition to the elementary school—which would make the combined Field School adequate for all of the elementary students in the district. The enrollment for the district in 1966-67 was 492 for grades 1-7, while the total enrollment at the Field School was 477 (grades 1-12).[18]

Unless the Board is required to cease maintaining dual facilities, not only will a predominantly segregated school system be fastened upon the community for at least another generation, but all students—Negro and white—will continue to pay the price of the inefficiency caused by operating a dual system in such a small district. This is graphically illustrated by the disparity in course offerings at the two high schools. If all students were attending the same high school, everyone would have the opportunity to take courses such as journalism or agriculture, as well as other courses which would be available because a higher total of students would elect them. Negroes who presently have no football, basketball or track programs would be able to participate in those sports. The basic sciences, chemistry and biology, are offered only in alternate years at Gould while they are offered every year at Field. There is no Future Farmers of America Program at Field because there is no agriculture course. In a consolidated system, all students would have the opportunity to take each of these courses every year.

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[18] *Ibid.*

The sad fact is that the Board's failure to consider grade consolidation not only perpetuates segregation but deprives both Negroes and whites of significant educational opportunities. It is no accident that the most important study of secondary education that has been made in this country, James Bryant Conant's, *The American High School Today* (1959) gives highest priority in educational planning to the elimination of small high schools with graduating classes of less than one hundred.[19] See *Moses* v. *Washington Parish School Board*, — F. Supp. — No. 15973, E.D. La. ("Free choice" plan "wasteful in every respect"; geographic zones ordered).

The court of appeals recognized that there is substantial evidence that consolidation is a feasible alternative to freedom of choice when it found that "there is no showing that the Field facilities with the new construction added could not be converted at a reasonable cost into a completely integrated grade school or into a completely integrated high school *when the appropriate time for such a course arrives*" (emphasis supplied), appendix, *infra*, p. 20a. Given the apparent feasibility of grade consolidation, the deficiencies of a "choice" plan in this district, and the fact that petitioners could not have explicitly sought consolidation in the trial court because the hearing took place long

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[19] "The enrollment of many American public high schools is too small to allow a diversified curriculum except at exorbitant expense . . . 'The prevalence of such high schools—those with graduating classes of less than one hundred students—constitutes one of the serious obstacles to good secondary education throughout most of the United States. I believe such schools are not in a position to provide a satisfactory education for any group of their students—the academically talented, the vocationally oriented, or the slow reader. The instructional program is neither sufficinetly broad nor sufficiently challenging. A small high school cannot by its very nature offer a comprehensive curriculum. Furthermore, such a school uses uneconomically the time and efforts of administrators, teachers, and specialists, the shortage of whom is a serious national problem" (p. 76).

before construction of new classrooms began, the court of appeals had an obligation to fashion a remedy equal to the task of disestablishing the dual structure. Instead, it erroneously affirmed dismissal of the complaint.

D. As Minimum Compliance With *Brown* v. *Board of Education* Petitioners Are Entitled to a Comprehensive Decree Governing the Desegregation Process.

As alternative relief, petitioners asked the court of appeals to issue a comprehensive decree governing the desegregation process similar to that imposed by another panel of the circuit in *Kelley* v. *Altheimer*, 378 F.2d 483 (8th Cir. 1967), and by the Fifth Circuit in *United States* v. *Jefferson County Board of Education, supra.* The court did not detail its reasons for refusing to grant this relief but only stated:

> Unlike the Altheimer situation, no attack has been made in the pleadings on the desegregation plan adopted by the Board. Additionally, we find no substantial evidence to support a finding that the Board was not proceeding to carry out the plan in good faith. (Appendix, *infra*, p. 24a)

If the failure of the court of appeals to subject the Board to a comprehensive decree, rather than dismissing the complaint, rests on whether an attack had been made on the plan in the trial court, it rests on a finding which is clearly erroneous. The complaint sought to enjoin the Board from compelling any Negroes to attend the all-Negro school (relief fundamentally inconsistent with the "choice" plan) and also sought to enjoin the "operating of a segregated school system" (R. 8). The trial is replete with testimony concerning the operation of the plan (R. 53-63, 67-71, 75, 95, 96, 101, 102, 109, 117, 118, 121-23) and the

district court refused to enjoin the Board from maintaining a segregated system as prayed only because he found the plan adequate (R. 14).

To the extent the second reason given by the court—that the Board was proceeding to carry out the plan in good faith—supports the court's conclusion that the complaint should be dismissed, it reflects a misconception of the role of lower courts in supervising the desegregation process, see *supra*, pp. 16-19). This petition describes administration of the Gould system in detail sufficient to show that whether the Board is acting in good faith or not, its performance is not such as to permit the lower courts to avoid supervision of the desegregation process.

In *United States* v. *Jefferson County, supra,* and in *Kelley* v. *Altheimer, supra,* the courts found that the policies and practices of the school boards had been designed to perpetuate segregation and for that reason, and to insure the continuity and speed of desegregation, ordered that any plan submitted by the boards would have to conform to certain principles as to student and faculty desegregation, transportation, school equalization and other areas touching on desegregation. At the very least, on the basis of the record in this case, petitioners were entitled to a retention of jurisdiction and entry of a comprehensive decree by the district court.

The finding of the Fifth Circuit in *Jefferson* that "case by case development of the law is a poor sort of medium for reasonably prompt and uniform desegregation" (372 F.2d at pp. 854-55) is undisputable. A comprehensive and uniform decree, therefore, provides invaluable assistance to district courts in fulfilling their responsibility to require the reorganization of segregated school systems under *Brown*. Such a decree provides a distillation of the ex-

perience in formulating desegregation standards of the courts, the Executive branch, educators and administrators. When adopted uniformly such a decree also avoids totally different rates of desegregation in communities which are similarly situated. It provides Negroes with a definite understanding of what they can expect, and district courts with what they must require, from school authorities. It insures that desegregation plans will encompass the minimum range of administration and planning functions which must be reorganized if the unlawful segregated system is to be disestablished.

This litigation should not have been necessary. At a minimum, the Negroes represented by petitioners are entitled to judicial supervision of desegregation where administrative supervision has not proved adequate as well as to a clear statement of the essential features which the plan must encompass. Only in this way will there be removed the "obstacles" to enjoyment of the right to an equal and desegregated education guaranteed by the Fourteenth Amendment—"obstacles" which this Court recognized must be destroyed thirteen years ago.

CONCLUSION

WHEREFORE, petitioners pray that the petition for writ of certiorari be granted.

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APPENDIX